Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1657

KATHERINE P. BOWE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

vs.

FIRST OF DENVER MORTGAGE INVESTORS, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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vs.

FIRST OF DENVER MORTGAGE INVESTORS, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit which was entered in this case on January 25, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported as *Bowe* v. *First Of Denver Mtg. Investors*, 613 F. 2d 798 (10th Cir. 1980). A copy of the opinion appears in the Appendix at pages 2-9. The District Court's opinion appears in the Appendix at pages 10-13.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The case arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j and statutory and common law of the State of Colorado.

QUESTION PRESENTED

Where class certification is denied and the named Plaintiff is thereby disabled to proceed on her individual claim, does a final order of dismissal for want of prosecution entitle her to appellate review of the class denial?

STATEMENT OF THE CASE

Plaintiff's Complaint

Plaintiff's complaint alleged that in issuing shares of beneficial interest of First Of Denver Mortgage Investors, Defendants committed a fraud on the market by suppressing certain material facts regarding the issuer's loan portfolio, its financial structure and other important matters. Plaintiff had purchased 100 shares, as a result of which she suffered an individual loss of approximately $1,800. The four count (amended) complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and violations of Colorado law. The suit was brought on behalf of a class which is comprised of approximately 6,000 other purchasers during a four year period.

Denial of Class Certification

Plaintiff's motion for class certification was denied by the District Court. The District Court's Order was principally grounded on two considerations. In the opinion of the District Judge:

> (1) "A single unhappy investor should not be empowered to call upon a court to undertake the difficulties likely to be encountered in the management of a class action of [this] magnitude . . . ." (App. 12)
>
> —and—
>
> (2) "The pretentious posture of small stake plaintiffs purporting to vindicate the public interest by the engorged encasement of the broadest possible claims in the capsule of a class action is an abuse of the purpose of Rule 23." (App. 12)

Plaintiff's Initial Attempts to Obtain Review

Plaintiff's first appeal to the Tenth Circuit was dismissed for lack of appealability.* Upon remand, Plaintiff sought permission to appeal under 28 U. S. C. § 1292(b), which was denied by the District Court.

Plaintiff's Inability to Proceed on Her Individual Claim Resulted in Dismissal for Want of Prosecution

Plaintiff's fee agreement with her lawyers was contingent upon success. It provided for the payment of attorneys' fees only upon securing a monetary recovery, and then only to the extent which the Court might award fees out of any suit-created fund. The lawyer time and resources which are necessary to prosecute Plaintiff's individual claim are virtually the same as that which would be involved in representing the entire class. By comparison with that enormous amount of time and effort, the compensation which Plaintiff's lawyers would receive for winning Plaintiff's individual claim is miniscule.

Accordingly, Plaintiff's lawyers declined to proceed further in the absence of a class. Plaintiff was unable to secure other qualified counsel to prosecute her individual claim. Plaintiff's inability to proceed further was explained to the District Court, whereupon a final order was entered, dismissing the case for want of prosecution.

Plaintiff's Second Appeal

Plaintiff again appealed to the Tenth Circuit, seeking reversal of the Orders which denied class certification and the dismissal which grew out of the denial of a class. The Tenth Circuit declined to review the class denial and dismissed the second

* That appeal was attempted prior to this Court's opinion in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), which rejected the "death knell" doctrine as a basis for appeal of interlocutory denials of class certification.

appeal. The Tenth Circuit held that "Here the denial of class action review ends the litigation", 613 F. 2d at 801 (App. 8), and that the dismissal "was a final order which could not become much more final", 613 F. 2d at 799 (App. 4), but nevertheless held that the class-denial was not appealable by reason of this Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978).

Subsequent to the Tenth Circuit's decision, this Court handed down *Deposit Guaranty Nat. Bank* v. *Roper*, ... U. S. ....., 48 U. S. L. W. 4279 (March 19, 1980) and *United States Parole Comm'n* v. *Geraghty*, ... U. S. ....., 48 U. S. L. W. 4296 (March 19, 1980).

REASONS FOR GRANTING THE WRIT

Introduction

Because Plaintiff's individual claim is small, without the benefit of a class action she cannot obtain the legal services and resources necessary to prove her allegations and obtain relief. The District Court's denial of a class effectively bars her access to the courts. The Court of Appeals' decision denies her any opportunity to obtain review of the District Court's decision.

ARGUMENT

I

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH AND MISAPPLIES A CONTROLLING DECISION OF THIS COURT

In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), this Court rejected the "death knell" effect of interlocutory class denials as constituting an exception to the finality requirement for appeal under 28 U. S. C. § 1291. *Livesay* held that interlocutory orders which deny class certification are subject to revision in the District Court, 98 S. Ct. at 2458, and are thus non-appealable. *Livesay* reasoned that the impact which class denial may have on the survival of the litigation is speculative. 98 S. Ct. at 2459, 2460. In the case *sub judice*, the impact of denial of a class is no longer speculative. Plaintiff's inability to proceed alone is clear beyond any doubt.

The other principal tenet of *Livesay* decries indiscriminate interlocutory review of the trial judge's decisions. 98 S. Ct. at 2461. In the case *sub judice*, plaintiff's second appeal came after dismissal of her individual claim (which resulted directly from the class denial). The dismissal was a final judgment, there was nothing left to be done in the District Court and there was no further opportunity for the District Court to modify any of its prior orders.

In *Livesay*, this Court made it clear that interlocutory class-denials are subject to effective review after final judgment at the behest of the named plaintiff. 98 S. Ct. at 2458. Despite the finality of the dismissal, the Court of Appeals viewed appealability of the earlier class-denial as depending on whether or not a final dismissal of plaintiff's individual claim "constitutes an exception to the *Livesay* doctrine". (App. 4)

The Court of Appeals thus misapplied *Livesay* in a manner which is destructive of the purposes of Rule 23 and stultifies the *Livesay* distinction between interlocutory and final orders.

Attorneys' fees are not separately recoverable in cases under the Securities Exchange Act of 1934. Effective enforcement of the securities laws depends on class actions. 6 Loss, *Securities Regulation*, 3938 (2d Ed. Supp., 1969). The individual claim of a class representative is frequently too small to justify the demanding effort which is necessary for its vindication unless the case proceeds as a class action. The situation in which denial of a class leads to dismissal of the individual claim of a small-stake class representative is likely to recur. In arriving at its conclusion of non-appealibility, the Tenth Circuit joined the Ninth Circuit, which came to the same conclusion in *Huey* v. *Teledyne*, 608 F. 2d 1234 (1979). The thus demonstrated tendency of the courts to misapprehend *Livesay* calls for certiorari to prevent its recurrence. Unless the decision of the Court of Appeals is reversed, incorrect class denials, followed by dismissals for want of prosecution resulting therefrom, will leave no remedy for plaintiffs whose opportunities to prosecute small claims is dependent upon the benefits of Rule 23, F. R. C. P.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH SUBSEQUENT DECISIONS OF THIS COURT

The Court of Appeals concluded that the dismissal for failure to prosecute was final but that "This conclusion does not, however, furnish a complete solution". (App. 4) The Court of Appeals also concluded that even if the dismissal resulted from the class denial, "these facts do not provide the finality necessary [for appeal of the orders]". (App. 4)

Two months after the Tenth Circuit's decision, this Court handed down *Deposit Guaranty Nat. Bank* v. *Roper*, ... U. S. ....., 48 U. S. L. W. 4279 (March 19, 1980) and *United*

States Parole Comm'n v. *Geraghty*, ... U. S. ....., 48 U. S. L. W. 4296 (March 19, 1980) In *Roper*, this Court held that a final judgment on the named plaintiff's claim does not terminate his right to take an appeal on the issue of class certification, 48 L. W. at 4281, and stated that:

> "We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment." 48 L.W. at 4282.

This Court concluded that a judgment on the named plaintiff's claim does not moot the private case and that even after judgment on the individual claim, the named plaintiff's individual interest in the litigation is sufficient to permit appeal of the adverse certification ruling. 48 L. W. at 4283.

In *Geraghty*, this Court held that "expiration" of the named plaintiff's claim does not prevent him from appealing the previously entered denial of class certification and that a proposed representative's interest in class certification entitles him to appeal therefrom, notwithstanding the mootness of his own claim on the merits. 48 L. W. at 4299-4300. Where the named plaintiff's claim is dismissed on account of inability to proceed alone, an even stronger case for appealability is presented. Here, Mrs. Bowe has a direct interest in the reversal of both the order which denied class certification and the resulting order which dismissed her personal claim.

The Court of Appeals' decision that it had to decline review over the District Court's order denying class certification is in conflict with this Court's intervening decisions in *Roper* and *Geraghty*, for which certiorari should issue.*

* On April 17, Plaintiff filed a motion in the Tenth Circuit Court of Appeals, seeking reconsideration of its ruling on account of *Roper* and *Geraghty*. Upon disposition of that motion, Petitioner will advise this Court.

CONCLUSION

For the reasons given herein, a writ of certiorari should issue to the Tenth Circuit Court of Appeals and the judgment of the Court of Appeals should be reversed and remanded with instructions to review the District Court's orders which denied class certification and dismissed the case for want of prosecution.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

For the Tenth Circuit

No. 78-1236

Katherine Bowe, on behalf of herself and all others similiarly situated, *Plaintiff-Appellant*	Appeal from the U. S. District Court for the District of Colorado
vs.	Dist. Ct. No. 75-M-350
First Of Denver Mortgage Investors, *et al.* *Defendants-Appellees*	The Honorable Richard P. Matsch Judge Presiding

WILLIAM DOYLE, *Circuit Judge.*

This suit was filed as a class action by Katherine P. Bowe on behalf of herself and the class which she allegedly belonged to. This large group had 6,000 members all of whom had acquired beneficial interests in the defendant, First of Denver Mortgage Investors. These acquisitions took place during a period which started in 1970 and continued to January 1, 1975. The complaint alleged that the defendants had engaged in a common course of conduct which constituted a conspiracy, the purpose of which was to manipulate the price by not disclosing material facts which would have reflected the real value of the securities. The suit was said to have arisen under § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Additional counts alleged violation of common law fraud principles and violation of the Colorado Securities Act. Plaintiff sought compensatory damages on behalf of herself and all members of the class. She also requested injunctive relief.

SUMMARY OF PROCEEDINGS

The district court, in an opinion rendered on March 16, 1976, denied the motion for certification of the class action. The court concluded that there was no basis for any class action since there were no allegations which demonstrated that the plaintiff, in view of her small investment, could represent the class. The court said, in proceeding under Rule 23, that "the court must do more than simply accept the plaintiff's conjurations," and added that "A single unhappy investor should not be empowered to call upon a court to undertake the difficulties likely to be encountered in the management of a class action of the magnitude sought in this case without more than what has been presented here." The court concluded that the case constituted an abuse of the purposes of Rule 23.

This court, in the appeal which followed the trial court's judgment of March 18, 1976, concluded that the case did not satisfy the requirements of the so-called "death knell" exception to § 1291 of the Judicial Code, which doctrine had been announced in *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. denied*, 386 U. S. 1035, 87 S. Ct. 1487, 18 L. Ed. 2d 598 (1967).[1] This court also concluded that the collateral order exception to the final judgment rule enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), did not encompass the problem presented and that, therefore, it was necessary to dismiss the appeal. Such an order was thereupon entered. This court's final conclusion was that since the "death knell" doctrine articulated in *Eisen* did not apply, and since the collateral order doctrine under *Cohen* did not apply, that there was no basis for entertaining the appeal. On remand the plaintiffs again sought to obtain certification of the

1. The plaintiff, when asked during the appeal whether her claim could be tried independent of the class, responded that it could. This fact precluded interlocutory appeal under the then alive "death knell" exception.

class, and following failure to do that, the trial court dismissed the individual complaint of the plaintiff on the ground of lack of prosecution.

Plaintiff maintains that this is no longer an interlocutory appeal; that the dismissal of her complaint resulted in the entire matter becoming appealable and reviewable. Accordingly, the question is whether the dismissal of the complaint for lack of prosecution constitutes a final judgment which will now permit the ruling of the trial court denying the motion for certification of the class action to be reviewed.

POSSIBLE REVIEW OF THE CLASS ACTION

Undoubtedly, the dismissal of the plaintiffs' complaint for failure to prosecute was a final order which could not become much more final. This conclusion does not, however, furnish a complete solution. We must consider plaintiff-appellant's contention that the only meaningful remedy for her claim is a class action and that the failure to certify the class was the actual basis for the dismissal. On its face, however, these facts do not provide the finality necessary to allow an appellate court to take hold of the merits of the plaintiff-appellant's standing as a representative of the class and the other problems which would be considered if a full review were to be granted. In fact, there has been little, if any, change in the status of the case since it was last considered by this court. Also, the law has changed since it was here previously. We cannot reach these questions, because since the prior proceedings the so-called "death knell" doctrine has itself been victimized. *See Cooper & Lybrand* v. *Livesay*, 437 U. S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). Actually the only issue that is properly before us is whether the fact situation in the case at bar constitutes an exception to the *Livesay* doctrine. Defendants say that to allow this appeal to be considered would clearly defeat the final judgment rule of 28 U. S. C. § 1291.

Unfortunately for the plaintiff-appellant, there is little in the way of distinction to be drawn between this case and the ruling in *Livesay*.

SUMMARY DISCUSSION OF LIVESAY

In *Livesay*, the Supreme Court considered an issue not unlike that which we have here. There, also, the appealability of class determinations was considered. The litigants had purchased securities in reliance on a prospectus. A suit was brought on behalf of themselves and a class of similarly situated purchasers. They alleged that the defendant accounting firm had violated the federal securities laws. The district court first certified the case as a class action and then, after further proceedings, decertified it. Respondents then filed a notice of appeal pursuant to § 1291 of the Judicial Code, the final decision appeals rule. The court of appeals determined that, considering the amount of the individual claims and the lack of financial resources of the individuals, that they could not pursue their claims individually. A further holding was that the "death knell" doctrine, allowing appeal under § 1291, applied where, without the incentive of a group recovery, the individual plaintiff would not be able to pursue his lawsuit. It entertained the appeal and reversed the district court's order of decertification of the class. The plaintiffs-respondents in the Supreme Court contended that there existed jurisdiction to prosecute the appeal under either the "death knell" doctrine or the collateral order exception of *Cohen*. However, the Supreme Court concluded that the "death knell" doctrine did not "support appellate jurisdiction of prejudgment order denying class certification." The Court concluded that the "death knell" rule, based as it is on a thorough study of the possible impact of the class order on the fate of the litigation, would result in seriously debilitating the administration of justice since it would call for the taking of evidence, the hearing of arguments and the making of findings, all of which would be subject to review in the court of appeals and would carry with it

the possibility for further need of factual development. The numerous hearings that would be required and the numerous reviews which would follow would place great burden on the trial and appellate courts. Since the order was not a final one, it was concluded that appealability defeated the purpose of the final judgment rule and of maintaining the apppropriate relationship between the respective courts. On that ground the court of appeals was reversed.

It is our conclusion that the case at bar is governed by the Supreme Court's decision in *Livesay* because, just as the final judgment rule was compromised in *Livesay*, so also in the present case there is similar lack of an appealable order. The only addition which can be pointed to in our case is a graphic demonstration that the "death knell" has indeed sounded. The plaintiff has been unable to proceed. No longer is it permissible, however, for plaintiff to establish an inability to proceed without class certification so as to be able to contend that the denial of certification "rang the death knell" on the plaintiffs' claim.

THE NINTH CIRCUITS DECISION IN HUEY v. TELEDYNE, INC.

The Ninth Circuit has very recently interpreted *Livesay*, and it too has determined that dismissal for failure to prosecute does not provide a basis for an exception to the *Livesay* doctrine. *See Huey* v. *Teledyne, Inc.*, 608 F. 2d 1234 (9th Cir., 1979). In that case the district court had denied certification of a class, and following that the complaint was dismissed for failure to prosecute. Review was sought of the denial of class certification. The Ninth Circuit ruling was that the denial of certification could not be reviewed in this context any more readily than it could have been reviewed in *Livesay*. The court said:

> The policy against piecemeal appeals applies to this case even though a final judgment has been entered. Just as the policy against piecemeal appeals preclude[d] the appeal of

> an order denying class certification—even where that may sound the "deal knell" of an action—so it precludes, review of that order from a proper dismissal for failure to prosecute which results from that order.
>
> * * * * *
>
> We recognize that we must balance conflicting interests. The hardship in refusing review of the denial of class certification after a dismissal allegedly caused by that denial and the forcing of some small claims to trial must be measured against the incentive for dilatory failure to prosecute in the district court that would otherwise result. We conclude that the balance should be struck to discourage piecemeal appeals. Where the record shows that the denial of class certification caused the failure to prosecute, that ruling does not merge in the final judgment for purposes of appellate review, at least where, as here, the resulting dismissal was proper.

Huey v. *Teledyne, Inc., supra,* 608 F. 2d at 1239, 1240.

Counsel for plaintiffs, and there are many of them, do not deny that if the *Huey* doctrine were to be followed, dismissal here would of necessity be affirmed. They, however, argue that the Ninth Circuit's position ought not to be adopted because of its injustice and also because it is out of harmony with the Fifth Circuit's decision in *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (5th Cir. 1978), *cert. granted,* 440 U. S. 945, 99 S. Ct. 1421, 59 L. Ed. 2d 633 (1979). It has to be noticed that the *Roper* decision was decided August 24, 1978, and *Livesay* was decided June 21, 1978. The closeness of time between the two cases prevented the *Roper* court from having the benefit of the *Livesay* ruling and reasoning. We also call attention to the fact that the Supreme Court has granted certiorari in *Roper*, but, more important, the condition in *Roper* was different. The question was whether a class action became moot following the trial court's denial of certification based on an evidentiary hearing where the defendant tendered payment in full to the class representative to satisfy the individual claims of the class representatives. The latter objected to this maneuver. The ruling of the Court of Ap-

peals of the Fifth Circuit was that the defendant was unable to bring about the mooting of the class claim by attempting this payoff and so, therefore, the plaintiffs were allowed to seek review of the refusal to certify on the basis that the representation of the class was still a live issue.

UNAPPEALABILITY OF THE CLASS ISSUE PRIOR TO TRIAL

Returning to our case, it must be concluded that the problem of the class representative's substantive claim is not distinguishable from that which was present in *Livesay*. The Supreme Court's decision in that case was a positive one which does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed for lack of prosecution. The dismissal of the claim of the class representative for failure to prosecute was a final order. The matter to be reviewed is whether the court properly dismissed the claim which belonged to the representative or whether there was abuse of discretion in so doing. The review of this judgment does not allow review of the order denying certification of the class. So, what we have is a "death knell" condition which is substantially similar to that which was present in *Livesay*. There is a negative effect of the decision of the Ninth Circuit in *Huey*, that is that it eliminates any review of orders which deny class certification where review may be necessary to avoid injustice. In a situation where the individual claims of class members are actually too infinitesimal to warrant individual litigation and the refusal to prosecute is not a ploy which seeks to develop a way around the *Livesay* doctrine, the plaintiff has only one way to go and that route is by way of a class action.

Here the denial of class action review ends the litigation. Perhaps the Supreme Court did not contemplate this situation in *Livesay*. It only considered the interlocutory character of the appeal under § 1291. So, it may be that it did not intend to totally

preclude review of the class issue even in situations where the plaintiff is unable to go forward following the denial of certification. There is, of course, the possibility that the denial of class certification can be reviewed after a trial where final judgment has been entered in the principal case. This would tend to indicate denial of interlocutory review in order to control when review can be had. This does not, however, remedy the case in which the plaintiff cannot afford to or otherwise refuses to prosecute the claim after denial of certification. It is possible that refinements will develop on a case by case basis, but whether or not this takes place is irrelevant where the only question is whether there is a genuine distinction between this case and *Livesay*. Our conclusion is that no such distinction exists.

In sum, appeal of the class issue is invalid at this preliminary stage. It is interlocutory notwithstanding that the individual case of the class representative stands dismissed. Our decision that we are without authority to review the denial of certification of the class necessarily ends the matter. Therefore, the appeal must be dismissed.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado

Civil Action No. 75-M-350

Filed March 16, 1976

Katherine P. Bowe, on behalf of herself and all others similarly situated,
Plaintiff,

vs.

First Of Denver Mortgage Investors, et al.,
Defendants.

Mr. Richard D. Greengard and Mr. Jeffrey A. Hyman, Elliott and Greengard, 231 Milwaukee Street, Suite 202, Denver, Colorado 80206; Mr. Charles Barnhill and Mr. Judson H. Miner, Davis, Miner & Barnhill, 14 West Erie Street, Chicago, Illinois 60611; Mr. David Parson, Mr. Robert Plotkin and Mr. Aram A. Hartunian, 33 North Dearborn Street, Suite 707, Chicago, Illinois 60602, attorneys for plaintiff. Mr. R. B. Danks and Mr. Edward R. Close, Jr., Hughes and Dorsey, 1600 First of Denver Plaza Building, Denver, Colorado 80202 and Mr. Peter F. Breitenstein, Fairfield and Woods, 1536 First National Bank Building, Denver, Colorado 80202, attorneys for defendants.

MEMORANDUM AND ORDER

MATSCH, *Judge*

This civil action was assigned to me after Judge Finesilver recused himself following oral arguments on the plaintiff's motion for class action determination, filed July 17, 1975. I have

reviewed the plaintiff's first amended complaint, filed June 3, 1975 and the extensive memoranda supporting and opposing the formation of a class. In my view, those memoranda are adequate statements of the respective positions of the parties and no further hearing is necessary. My conclusion is that the plaintiff's motion must be denied.

Upon the basis of a single purchase of 100 shares of beneficial interest in First of Denver Mortgage Investors, a Massachusetts business trust, qualifying as a real estate investment trust under §§ 856-858 of the Internal Revenue Code, with a total investment of approximately $2,300.00, Katherine Bowe, appearing by three law firms, wants to be declared to be representative of all persons who acquired shares or warrants to purchase shares of the trust at any time from its inception in 1970 to January 1, 1975, estimated to be approximately 6,000 persons. That presumption proceeds from sweeping charges that the trust and all of the other defendants engaged in a "common course of conduct and conspiracy, in which defendants manipulated and inflated the price of securities issued by First of Denver Mortgage Investors by failing to disclose material facts."

The defendants' conduct is claimed to be violative of § 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, a breach of fiduciary duties, common law fraud and contrary to the Colorado Securities Act. The complaint seeks compensatory damages for the plaintiff and all other members of the class. It also seeks an injunction from continuing unlawful conduct and a declaratory judgment that the defendants are in violation of the law.

It is difficult to see any basis for a class action. There is no indication that the plaintiff relied upon any public documents concerning the securities of the defendant trust. The plaintiff remains as a holder of beneficial interests in the trust. How her interests would be aligned with all those who have purchased and sold such interests from the beginning of the trust is far from clear.

The plaintiff says that her case is based upon omissions and nondisclosures which constituted a "fraud on the market." It is apparent from the briefs that the years involved in this claim saw many economic changes which had impact on the business of the trust and which would vary the duty of disclosure significantly. That, in itself, is a sufficient factual variation to prevent the kind of class relief sought here.

In applying the prerequisites to a class action under Rule 23, the court must do more than simply accept the plaintiff's conjurations. A single unhappy investor should not be empowered to call upon a court to undertake the difficulties likely to be encountered in the management of a class action of the magnitude sought in this case without more than what has been presented here.

Essentially this is a claim for damages. The prayer for declaratory judgment and for an injunction are pretextural efforts to obtain a class certification on more convenient grounds than the showings necessary under Rule 23(b)(1) and (3).

In my view the plaintiff has failed to show that there are questions of law or fact common to the class; that her claims are typical of the claims of the purported class; that she can fairly and adequately protect the interests of the purported class; that there is a desirability of concentrating litigation of claims in this forum and that the advantages of class litigation would outweigh the obvious difficulties to be encountered in the management of a class action of the magnitude suggested in this case.

This is an example of the kind of case which has become all too common in securities litigation. The pretentious posture of small stake plaintiffs purporting to vindicate the public interest by the engorged encasement of the broadest possible claims in the capsule of a class action is an abuse of the purpose of Rule 23. The most common result is a settlement forced by the frustration and expense attendant upon the defense of such generous claims with negligible benefit to those for whom relief is supposedly sought.

There may be merit in the claims of Katherine P. Bowe. If so, it can best be determined by proceeding expeditiously with her individual complaint.

Accordingly, it is

ORDERED that the plaintiff's motion for certification of a class action is denied and this case shall proceed as an individual claim upon the amended complaint herein.

Dated at Denver, Colorado, this 16th day of March, 1976.

By the Court:

/s/ Richard P. Matsch,
Richard P. Matsch,
Judge United States District Court

Supreme Court, U. S.
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OCTOBER TERM, 1979.

No. 79-1657.

KATHERINE P. BOWE,
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FIRST OF DENVER MORTGAGE INVESTORS ET AL.,
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In the Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1657.

KATHERINE P. BOWE,
ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
PETITIONER,

v.

FIRST OF DENVER MORTGAGE INVESTORS ET AL.,
RESPONDENTS.

Respondents' Brief in Opposition.

The respondents, defendants below, submit this brief in opposition to the petition for certiorari filed by the petitioner, and respectfully request that the petition for certiorari be denied.

Opinions Below.

The judgment of the United States Court of Appeals for the Tenth Circuit (Pet. A.2) was entered on January 25, 1980, and has been reported as *Bowe* v. *First of Denver Mtg. Investors*, 613 F.2d 798. That judgment dismissed an appeal from a final judgment entered in the United States District Court for

the District of Colorado on February 9, 1978, on the ground of lack of prosecution. (See Pet. at 4). Prior to that judgment, the United States Court of Appeals for the Tenth Circuit had considered the petitioner's earlier attempt to appeal the denial of class certification by the United States District Court for the District of Colorado on March 16, 1976 (Pet. A.10); that earlier appeal was also dismissed, in an opinion reported as *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640 (1977).

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Counterstatement of Question Presented.

Where class certification is denied by the district court, can the named plaintiff seek appellate review of that determination as of right prior to trial on the merits, by voluntarily obtaining a final order of dismissal for failure to prosecute and asserting that dismissal must be reversed automatically on appeal if the class determination is found to be erroneous so as to permit the named plaintiff then to proceed with trial on the merits?

Counterstatement of the Case.

The petitioner's Amended Complaint, alleging federal and state securities violations, sought certification of a class. In

a hearing on the class issue petitioner, by her attorney, represented to the District Court that she was prepared to continue with the merits of the case whether or not a class were certified. The District Court denied class certification, finding, *inter alia*, that the questions presented were individual questions, not satisfying the requirements of Rule 23, because allegations of the Amended Complaint related to changing economic conditions and resulting business decisions over a wide time period "which would vary the duty of disclosure significantly" (Pet. A.12) (See Rule 23(b)(3)); that the advantages of a class proceeding would not outweigh the manageability problems involved (Pet. A.12); and that neither the requirement of "typicality" nor that of "adequate representation" (See Rule 23(a)(3), (a)(4)) was satisfied (Pet. A.12).

Petitioner sought to appeal the class decision before going forward with her individual claim. The Tenth Circuit dismissed the appeal, holding that the "death knell" exception to the finality requirement of 28 U.S.C. § 1291 did not apply because of petitioner's counsel's assurance to the trial court that she was prepared to proceed with the merits whether or not a class were certified. (See *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640; Pet. A.3, at n.1.)

The petitioner did not then proceed to trial of her own case on the merits, as the Tenth Circuit had contemplated. Instead she asserted that she would not try her own case, and voluntarily invited a dismissal for failure to prosecute. The District Court dismissed with prejudice on that ground, and petitioner again appealed. The Tenth Circuit again dismissed, finding petitioner's procedure a further attempt to obtain review of the class decision before trial of the merits, the very "piecemeal" appeal barred by *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (See Pet. A.8).

Argument.

The petitioner asserts in her Introduction (Pet. 5), that because her individual claim is small, "without the benefit of a class action she cannot obtain the legal services and resources necessary to prove her allegations and obtain relief" and that the decision below "denies her any opportunity to obtain review of the District Court's decision." This focus, which is the core of the petition for certiorari, itself shows why certiorari should not be granted. The petitioner is attempting to relitigate this Court's recent unanimous decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), which, in abolishing the "death knell" doctrine, rejected precisely this argument that plaintiffs could as of right appeal the class decision prior to trial. The Tenth Circuit correctly applied *Livesay*, holding that petitioner could not obtain review of the denial of class certification before proceeding to the merits as she had attempted to do.

Moreover, the record will not support petitioner's assertion that forcing her to try her own case before appealing the class decision resulted in her inability to proceed. The petitioner had assured the district court that she was willing and able to proceed on an individual basis; appellate review was initially denied for precisely that reason. In several other ways as well, see point I, *infra*, petitioner's assertions as to her inability to proceed with this particular claim (Pet. 4) are not supported by, or are clearly contradicted by, the record. Thus this case, which has turned on unusual facts, is not in any event the case in which to evaluate any general assertion that small claim plaintiffs are entitled to follow the petitioner's novel path to permit appeal of class denial before proceeding with trial on the merits of the individual claim.

I. The Factual Issues Presented by the Petition were Correctly Decided Below and are too Narrow to Warrant Review by This Court.

The petitioner's argument makes clear that she is objecting to the requirement that denial of class certification by the District Court cannot be appealed until after trial of her own case on the merits. The petitioner says that this rule leaves her without any opportunity for review at all (Pet. 5), and that her lawyers (and all others) will not proceed further with her case without a class, so that she cannot prosecute her own claim (Pet. 4). Aside from the fact that this rule is imposed by this Court's own recent decision in *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. 463, see point II, *infra*, this petitioner cannot plausibly present that argument for review; her own asserted inability to proceed is contradicted by the record in several ways that make this an atypical case, with no general precedent value.

First, this petitioner assured the District Court that she would pursue her claim regardless of class certification. See *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640, 643:

> In the case at bar, there is an affirmative showing in the trial court record (even though at oral argument counsel for Bowe represented otherwise) that Bowe would proceed with her suit without a class certification:
>
> THE COURT: Without a Class action certification, and I'm not prejudging the Class action certification, is your client prepared to go ahead with this litigation?
> MR. PLOTKIN: Yes, Your Honor.
> THE COURT: Without a Class action certification?
> MR. PLOTKIN: Yes, she is prepared. . . .

This was the reason her "death knell" appeal, prior to the *Livesay* decision, was not permitted by the Tenth Circuit.

Second, the petitioner now asserts (Pet. 4) that her fee agreement was contingent upon success, and that because her own recovery would be small no qualified counsel would continue with her individual claim. But the record in this case is completely void of any evidence concerning her fee arrangements. Indeed the following interrogatory was propounded by the defendants to the plaintiff:

> 61. Have you agreed to any fee arrangement with any person concerning the handling of this lawsuit?

The defendants received an objection to this interrogatory as follows:

> Plaintiff objects to the following interrogatories on the ground that they concern matters which are not relevant to the subject matter involved in this action, are not discoverable on any basis and, with respect to many of such interrogatories, appear to have been designed to annoy or harass plaintiff: . . 61 . . .

Third, the record contradicts in other ways the statement that petitioner was unable to secure any other qualified counsel to proceed with trial of her case. This assertion is both suspect in general and an inappropriate basis in this particular case to present an issue worthy of this Court's consideration. In general, even if attorneys are willing to consider such cases only when there is a possibility of ultimate class-wide recovery, that possibility still exists after an initial class denial. If counsel believe that the District Court was clearly wrong in

denying class certification, they must believe the class ruling can ultimately be reversed and a class certified, so that recovery can be obtained for the class by appeal at the proper time. After initial denial of class certification a plaintiff obviously proceeds with the risk that no class-wide recovery will occur, but similar risks obtain in much individual contingency litigation, where no recovery is certain until after trial and appeal. When this Court held in *Livesay* that the "death knell" doctrine was improper, it noted that its decision did not make pursuit of such actions impossible. See 437 U.S. at 470 & n.15:

> The litigation will often survive an adverse class determination. What effect the economic disincentives created by an interlocutory order may have on the fate of any litigation will depend on a variety of factors[15] . . .

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[15] E.g., the plaintiff's resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification.

In any event such an assertion makes no sense on this particular record. The petitioner asserts, for example, that it was impossible to find counsel to pursue the individual case because attorneys' fees are not recoverable under the Securities and Exchange Act of 1934 (Pet. 7). This argument conveniently neglects the fact that Count IV of the Amended Complaint alleges a violation of the Colorado Securities Act, which explicitly authorizes an award of attorneys' fees (C.R.S. 11-51-125 (1973)). Attorneys' fees are designed to make possible the continued prosecution of an individual case, as petitioner's argument assumes, but such a provision *was* present in this case.

Moreover, the record will not permit the petitioner's assertion (Pet. 4) concerning the "enormous amount of time and effort" that would be imposed upon her counsel in prosecuting this litigation. Her attorney told the District Court:

> MR. PLOTKIN: . . . But I would submit, respectfully, Your Honor, that it is not a particularly complex case, nor is discovery relating to it particularly complex. On the contrary, it is relatively a simple case as we see it. (Tr. 12, July 21, 1975).

Thus in a number of ways the particular facts here make this case an inappropriate vehicle for this Court to reconsider the general problem the petitioner purports to set out: the options open to a small claim plaintiff who must try the merits before appealing a class certification denial.

II. The Court's Prior Decision in *Coopers & Lybrand* v. *Livesay* Is Controlling.

The petitioner sought to declare the case "finally" over by refusing to prosecute her own claim, to have a "final judgment" entered against her (as a matter of form only), and to appeal the class issue under 28 U.S.C. § 1291. Further, she argued below, if victorious on the class issue she had a right to return to the District Court to prosecute her claim on the merits *as though there had been no final judgment on that claim*, since the dismissal of that claim, having been "caused" by the class denial, would also be automatically reversed. The petitioner thus asserted she could create an artificial (i.e., nonbinding) "finality" on the merits, solely for the purpose of triggering the proper time to appeal the class question in advance

of the real determination on the merits. Thus the petitioner tried to assert that she could, as of right, appeal the adverse class decision first, then proceed to trial on the merits. But this is exactly the "piecemeal" litigation forbidden by *Livesay*. The Tenth Circuit saw as much, and rejected this procedure. To hold otherwise would permit a plaintiff, by such voluntary action, to accomplish piecemeal appeal in *every* case simply by refusal to proceed with the merits as *Livesay* contemplated. The result would be a rule far more lax even than the "death knell" doctrine (Pet., at A. 8); the *Livesay* rule would be completely avoided at any plaintiff's option. Petitioner was thus trying to overturn *Livesay*, or evade it, and the petition should be denied on the basis of the *Livesay* opinion.

III. The Decision of the Court of Appeals Does not Conflict with any Decision of This Court.

The two recent decisions of this Court cited by the petitioner deal with a different problem than the one presented by this petition. In *Deposit Guaranty National Bank* v. *Roper*, 48 U.S.L.W. 4279 (March 19, 1980), the plaintiffs were tendered the full amount owed by the defendant, in effect a victory in the individual case without trial (and a move obviously designed to make sure no one was left to pursue the class action). This Court summarized the issue as follows:

> We granted certiorari to decide whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification. 48 U.S.L.W. at 4280.

The Court stated:

> . . . to deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration . . ., *id.* at 4283,

and concluded that the judgment "did not moot" the case or controversy and that the named plaintiffs retained standing to appeal the class denial. *Id.*[1]

In *United States Parole Commission* v. *Geraghty*, 48 U.S.L.W. 4296 (March 19, 1980), the individual's challenge to parole board procedures was mooted once the individual plaintiff was no longer in custody; again the Court found that standing to appeal the class decision remained.

In *Roper* and *Geraghty* the Court thus permitted individual plaintiffs, despite objections to their continued *standing* after a genuine end to their own disputes on the merits, to pursue the class questions on appeal. *Livesay* was not overturned by *Roper* and *Geraghty*. Rather, they take the *Livesay* rule — trial or other true disposition of the merits first, and then appeal of all issues including the class decision — as correct and then simply insure that the later appeal can be prosecuted. See, e.g., *Roper*, *supra*, 48 U.S.L.W. at 4282, 4283 ("appealability . . . *after* final judgment on the merits"). Those decisions in effect insure that the timing requirements specified in *Livesay* constitute a workable system; if a plaintiff does resolve the merits of his own case, he will still retain standing to appeal the class question at the proper time, after

[1] The factual difference between *Roper* and the instant case could not be clearer. Here, by Order dated February 9, 1978, the District Court dismissed the action reciting that plaintiff *conceded* that the case should be dismissed for want of prosecution.

that resolution. The problem in this case is a different one: the petitioner tried to create a judgment "final" in form but with no final or binding effect in substance in order to appeal the class issue prematurely, not at the end of the case but at the beginning. The issue was finality and piecemeal appeal, the issue addressed by *Livesay*, see section II, *supra*, not continued standing to appeal the class decision at the proper time. The opinion below is not inconsistent with *Roper* and *Geraghty*, which have not disturbed *Livesay's* prohibition of piecemeal review.

IV. The Decision of the Court of Appeals Does not Conflict with any Other Court of Appeals Decisions.

The petitioner has not asserted that the opinion below conflicts with the law in other circuits. Indeed the only other Court of Appeals case on the issue reached the same conclusion the Tenth Circuit arrived at here. *Huey* v. *Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979).

Conclusion.

For the reasons given herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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